

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 17

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ALICE STROUGO

Appeal No. 98-1906
Application D29/045,336¹

ON BRIEF

Before CALVERT, FRANKFORT and STAAB, Administrative Patent Judges.

STAAB, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on an appeal from the examiner's final rejection of the following design claim:

The ornamental design for an UNDERGARMENT as shown
and described.

¹ Application for patent filed October 17, 1995.

By way of background, this application was originally filed with seventeen (17) drawing figures depicting several patentably

distinct embodiments of the ornamental design. In response to a restriction requirement (Paper No. 2), appellant elected (Paper No. 3) to prosecute the embodiment represented by original figures 1, 2, 2a, 3, 4, 15 and 16 in this application. Subsequently, new drawings comprising seven (7) drawing figures corresponding, respectively, to original figures 1, 2, 2a, 3, 4, 15 and 16 were submitted as an attachment to the reply brief (Paper No. 10) and approved for entry by the examiner (Paper No. 13). Accordingly, any reference in this opinion to appellant's drawing figures is with respect to the new drawings attached to appellant's reply brief.²

As seen in the application drawing figures, appellant's

²At this juncture, the description of the drawing figures appearing in the specification does not correspond to the newly submitted and approved drawings. Upon return to this application to the examiner's jurisdiction, the examiner should see to it that this deficiency is corrected.

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invention is directed to the ornamental design for a woman's panty or brief having, inter alia, a pentagonal shaped crotch piece (fig. 3) and a vertical back seam arranged such that, when the panty or brief is viewed from the back (see, for example, fig. 2), only a small pointed end of the crotch piece is visible beneath the vertical back seam.

The single reference of record relied upon by the examiner in support of a rejection under 35 U.S.C. § 103 is:

Milberg	2,651,048	Sept. 8,
1953		

The claim stands rejected under 35 U.S.C. § 103 as being unpatentable over Milberg.

The examiner's rationale for the rejection is found on pages 3 and 4 of the first office action (Paper No. 4) and reads as follows:

7. The overall appearance of [the] claimed design is substantially disclosed by Milberg Figures 1 and 2[], except that the front crotch seam is slightly rounded and the rear pointed end is slightly taller than in [the] claimed design.

8. The overall appearance would have been obvious to one of ordinary skill in the art at the time the invention was made in view of Milberg. That is, the claimed design fails to present a distinctive appearance over the reference to warrant patentability. The slight differences cited above are considered minute. They do not change the overall appearance of the design and thus do not render the claim patentable thereover.

9. It is Examiner's position that the claimed design and the referenced article would be considered by one of ordinary capability who designs articles of this type to be mere manifestations of the same design, rather than characteristically different designs.

Appellant argues in the main and reply briefs that the difference in appearance of the claimed design as compared to Milberg brought about by the change in location of the juncture of the crotch to the vertical back seam is not minute, but instead results in a new and patentably distinct ornamental design. Appellant also relies on the declaration of Maria Hudson (attachment to Paper No. 5) in support of the patentability of the present invention.

Opinion

From a cursory review of appellant's drawings, it is clear that the illustrated design is rather plain in appearance. One of the predominate visual features of the design is the vertical back seam that extends almost the entire extent of the backside of the undergarment and joins the pointed end of the crotch close to the bottom. The resulting appearance when viewed from the back is one of large left and right panels that predominate over the relatively small triangular shaped section of the crotch visible from the back. Turning now to Milberg's figure 2, we see that the vertical back seam 14 joins to the pointed end of the crotch at a location 15 in the middle of the garment. The resulting appearance is one where a relatively large section of the crotch

is visible such that left and right panels on either side of the vertical back seam do not predominate over the triangular shaped section of the crotch to the same extent as in the claimed design. This being the case, the examiner's

conclusion that the location of Milberg's joint 15 is merely a slight difference that does not change the overall appearance of the design such that the claimed design and the reference design would be considered by one of ordinary capability who designs articles of this type as mere manifestations of the same design is not well taken in the absence of some evidence to support the examiner's position.³ In that no other reference evidence has been cited by the examiner to support this position, the examiner has failed to provide a sufficient factual basis to support a conclusion of obviousness. *In re Warner*, 379 F.2d 1011, 1017, 154 USPQ 173, 178 (CCPA 1967), *cert. denied*, 389 U.S. 1057 (1968).

The decision of the examiner is reversed.

³The case law cited by the examiner on page 5 of the answer for the proposition that minute changes are normally held to be obvious is noted. In that we do not consider the location of the junction of the vertical back seam and crotch of Milberg to be a minute or inconsequential change relative to appellant's design, these citations are inapposite.

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REVERSED

IAN A. CALVERT)	
Administrative Patent Judge)	
)	
)	BOARD OF PATENT
CHARLES E. FRANKFORT)	
Administrative Patent Judge)	APPEALS AND
)	
)	INTERFERENCES
)	
LAWRENCE J. STAAB)	
Administrative Patent Judge)	

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